No. 21670

United States
COURT OF APPEALS
for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant and Cross-Appellee,

v.

DONALD L. BREWER, Administrator of the Estate of William Ira Pate, Deceased,

Appellee and Cross-Appellant.

BRIEF FOR APPELLEE AND CROSS-APPELLANT

On Appeal from the United States District Court for the District of Oregon

HONORABLE BRUCE R. THOMPSON, Judge

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JURISDICTIONAL STATEMENT

Appellee and Cross-Appellant accepts the jurisdictional statement of Appellant and Cross-Appellee.

QUESTIONS PRESENTED

In an effort to avoid cumbersome phraseology, appellant and cross-appellee will hereinafter be referred to simply as appellant or the insurer or the

insurance company and appellee and cross-appellant will hereinafter be referred to simply as appellee or the administrator of the estate of the deceased insured.

For similar reasons, the policy holder will be referred to as the insured or Pate and the injured plaintiff and judgment creditor in the State court personal injury action will be referred to as Brewer.

This Federal court case was divided into two parts:

(1) The negligence and bad faith of the insurer in not settling the personal injury action against its insured within its policy limits of $10,000.00 before the jury therein rendered a verdict for $42,141.25;

(2) The negligence and bad faith of the insurer in not settling the judgment of $42,141.25 within the policy limits of $10,000.00 after verdict and before motions for new trial was denied (R. 72-86).

The Federal trial judge, sitting without a jury, allowed judgment herein to the Administrator of the estate of the deceased insured for the full amount of the excess judgment plus attorney's fees in prosecuting the excess judgment case below.

In arriving at this judgment, the Federal trial judge found that the insurer did not act negligently and in bad faith before the verdict was rendered but did act negligently and in bad faith in not settling the $42,141.25 judgment after verdict and before the motions for new trial were denied in the personal injury case.

He also found that $4,000.00 was a reasonable attorney's fee to be allowed for prosecuting the Federal court excess judgment case below (R. 122-128).

It is the position of appellee (contrary to the position of the appellant) that the Federal trial judge did not err in allowing judgment in the personal injury action plus attorney's fees but did err as follows:

> (1) In not also basing his judgment against the insurer on the further ground that the insurer had acted negligently and in bad faith in failing to settle the personal injury action within the policy limits of $10,000.00 before the jury rendered its verdict for $42,141.25;
>
> (2) In limiting attorney's fees to the sum of $4,000.00 instead of in the larger sum of $12,791.75 as called for by a contingent fee arrangement. This error came about because the Federal trial judge refused to recognize the validity of a contingent fee arangement despite the fact that the Oregon Supreme Court has upheld such an arrangement in a case of similar nature (Tr. 316-318; *Denley* v. *Oregon Auto Ins. Co.*, 151 Or. 42, 57, 58, 47 P.2d 946 (1935).

The gravamen of the cause of action herein is that the insurer violated the contractual terms of its policy under which it had sole control over negotiations and settlement of the personal injury action against its insured in that the insurer acted negligently and in bad faith in failing to settle within the policy lim-

its of $10,000.00 (R. 77; Pl. Exh. 11, insurance policy).

STATEMENT OF THE CASE

The statement of the case by appellant is incomplete. Therefore the statement of the case by the appellee follows:

Donald L. Brewer is the duly appointed, qualified and acting administrator of the insured's estate and in that capacity was the plaintiff in the excess judgment case below.

Donald L. Brewer was also the injured claimant and plaintiff in the State court personal injury action against the insured, Pate, but is not suing here in that capacity.

As the administrator of Pate's estate, Brewer is the proper party plaintiff herein (Points and Authorities (1), (2), (3), (4), *infra.*

The amount sued for herein was in the liquidated sum of $31,979.38, representing the difference between the personal injury verdict of $42,141.25 plus costs of $88.24 and the sum of $10,000.00 plus $250.11 on account of costs and interest which the insurance company paid into the registry of the State court on May 7, 1964 in partial satisfaction of said judgment after its motions for new trial and been denied (R. 75, 76).

The amount sued for herein also included the additional sum of $12,791.75 as attorney's fees for

prosecuting this action. The attorney's fee was based upon a contingent fee arrangement of 40% of the amount sued for or 40% of $31,979.38 in accordance with the Minimum Bar Fee Schedule of the Oregon State Bar (R. 76, 84-Tr. 40, 41, 316-318).

Prior to the commencement of this action the Probate Judge, having jurisdiction over the Pate estate, examined and allowed the claim of Brewer, the injured plaintiff in the State court action, against Pate's estate in the said sum of $31,979.38 (R. 76).

Before and at the time the personal injury complaint was filed and the case tried, Donald L. Brewer was using the name of Lee D. Breuer and his complaint was filed and his case tried under that name. Use of the name, Lee D. Breuer, was not made to defraud creditors or for any improper purpose and the State trial judge so held in later denying the motions for new trial (Pl. Exh. 7, Brewer's Affidavit; Pl. Exh. 10, pp. 187-189, 192; Tr. 7, 8, 11).

With reference to the personal injury action, the allegations of negligence alleged and submitted were that Pate, the insured, failed to keep a proper lookout, proper control or to stop, turn or swerve his vehicle to avoid the collision and that he failed to yield the right of way to Brewer (Pl. Exh. 10, pp. 88-90; Pl. Exh. 1).

In his answer, Pate denied these acts of negligence and alleged that Brewer was contributorily negligent in failing to keep a proper lookout, proper control, and in driving at an excessive speed and

running a red traffic light (Pl. Exh. 10, pp. 91, 92; Pl. Exh. 2).

In his reply, Brewer denied the charges of contributory negligence and demanded judgment for $75,000.00 general damages and $12,141.25 special damages (Pl. Exh. 10, p. 92; Pl. Exh. 3).

Much of the evidence herein to prove that the insurer acted negligently and in bad faith in failing to settle the personal injury case both *before* verdict and *after* verdict cannot be controverted. This is so, because this vital evidence is in the form of written exhibits herein. Or it is contained in the written transcript of all the testimony and proceedings of the State trial judge and exhibits at the trial stage of the personal injury action (Pl. Exhs. 9, 10, 33).

As will hereinafter be shown, the evidence, at the State trial, of Pate's negligence was overwhelming and the evidence of Brewer's contributory negligence was weak or nonexistent.

The seriousness and permanency of Brewer's injuries were uncontested by the insurer at the State trial. The insurer had Brewer examined by its own doctor but did not have this doctor testify at the trial and did not cross examine the doctors called by Brewer (Pl. Exh. 10, pp. 57, 77; Pl. Exhs. 18, 21, p. 5).

Also, the amount of the special damages (medical expenses and wage loss up to the time of trial) in the sum of $12,141.25 was not controverted by the insurer (Pl. Exh. 21; Pl. Exh. 10, p. 82; Pl. Exh. 9,

p. 48). The amount of the special damages alone exceeded the policy limits.

To better understand the facts of the accident, this Court should find it helpful to have before it a large diagram of the scene and which shows distances, skid marks and various locations as given by State court witnesses. This diagram is Plaintiff's Exhibit No. 33 in the Federal court below.

The evidence showed, among other things, that the accident happened at approximately 2:50 a.m. in the early morning of July 23, 1962 in the intersection of S.E. 26th Avenue and Powell Boulevard in Portland, Oregon (Pl. Exh. 10, p. 7; Pl. Exh. 9, pp. 7-14).

Southeast 26th Avenue runs in a north to south direction and S. E. Powell Boulevard in an east to west direction. Southeast 26th Avenue was 36 feet wide with one moving lane for traffic going south and one for traffic going north. Southeast Powell Boulevard was 59 feet wide with two moving lanes for traffic going east and two for traffic going west (Pl. Exh. 33; Def. Exh. 20).

Pate, the insured, was on his way to work as a truck driver, driving his 1961 Pontiac automobile. Brewer was on his way home from work as a service station attendant, driving his motorcycle. Prior to the impact, Pate was driving north on S. E. 26th Avenue intending to turn left, or to the west, at the intersection. Brewer was going south on S. E. 26th intending to go straight through the intersection (Pl. Exh. 9, pp. 4-11, 100-102).

The evidence showed that just before the collision, Pate skidded some 11 to 12 feet from his side of S. E. 26th Avenue and across its center and some 5 feet onto Brewer's side of S. E. 26th Avenue while attempting a left turn across the path of Brewer's oncoming motorcycle. The skid marks led into the debris in the street—the point of debris (or point of impact) being 5 feet west of the center of S. E. 26th Avenue. Evidence on the skidmarks and point of debris was given by Police Officer Tardiff who investigated the accident and who was called as a witness by Brewer (Pl. Exh. 10, pp. 10-15; Pl. Exh. 33).

Officer Tardiff also testified that at the scene of the accident, Pate said that "he had been northbound and that he started to turn left at Powell, saw the lights flicker or the light flicker on the motorcycle and he stated he thought he was stopped at the time of the actual impact of the two vehicles." (Pl. Exh. 10, p. 19). At the trial, Pate did not deny making this statement to the police officer but on direct examination testified he was stopped 5 or 7 seconds before the impact (Pl. Exh. 9, p. 103).

Pate further testified at the trial that he first saw the motorcycle some 20 to 30 feet before it entered the intersection and it looked to him as if it were coming pretty fast so he came to an abrupt stop some 2 or 3 feet over the imaginary center line of S. E. 26th Avenue in the intersection (Pl. Exh. 9, p. 102). He also testified that as he entered the intersection the traffic light turned from green to yel-

low for him (Pl. Exh. 9, p. 102). He located the point of impact as over the center of S. E. 26th Avenue in Brewer's lane of traffic and in the Southwest quadrant of the intersection (Pl. Exh. 9, pp. 116, 117).

On cross-examination, Pate admitted that he first saw the motorcycle when it was at the intersection and admitted that in his deposition he testified that he came to a stop when the motorcycle was 20 to 30 feet from him and admitted in his deposition he had testified he was only stopped a couple of seconds before the impact (Pl. Exh. 9, pp. 109, 110). Obviously Pate tried to change his testimony at the trial from what he had given in his deposition and was caught doing it.

After the jury returned its verdict for Brewer, Mr. Samuels, the insured's trial lawyer, made a report to the insurance company on the trial. Among other things, he pointed out that Pate was "obviously nervous and became quite confused" and pointed out some of the respects in which Pate changed his testimony between deposition and trial (Pl. Exh. 21, pp. 4-5).

Oregon is a conservative jurisdiction where juries do not take kindly to witnesses or parties who change their sworn testimony between deposition and trial (Tr. 122, 123). And yet the insurer and its trial counsel still refused to settle for policy limits of $10,000.00 where the provable specials alone exceeded $12,000.00 and under circumstances where they

knew or should have known that the trial was turning "sour" for their insured (Tr. 116-123).

Brewer testified that he was going 20 to 25 miles per hour as he approached the intersection; that the traffic light was green for him and that when he was 10 to 15 feet from Pate, Pate moved forward, into Brewer's lane of traffic, to complete a left turn in front of Brewer's motorcycle (Pl. Exh. 9, pp. 13, 14, 17, 11, 12).

At the time of the accident, Thomas Curulli was a gas station attendant working on the northwest corner of the intersection. At the time of the trial, Curulli was a sailor in the U. S. Navy stationed in Adak, Alaska (Pl. Exh. 9, pp. 73-74).

Prior to the trial, the insurer knew of Curulli and on September 25, 1962 took a statement from him which made it appear that Curulli knew little or nothing of significance about the accident (Def. Exh. 19; Tr. 282).

At the trial, as an independent witness called by Brewer, Curulli testified that he first noticed the motorcycle when it was about 60 feet from the intersection at which time the traffic light was green for the motorcycle and it was going south on S. E. 26th Avenue at a speed of about 25 miles per hour (Pl. Exh. 9, pp. 75, 76, 78).

Curulli last saw the motorcycle before the impact just as the motorcycle was entering the north side of the intersection at which time the traffic light was

still green for it. At that time he also saw Pate's car just entering the south side of the intersection with its signal light turned on. Pate's car was moving, not stopped. He designated this point of the motorcycle as point 4 and this point of Pate's car as Point 5 on plaintiff's Exhibit 33 (Pl. Exh. 9, pp. 76-87). He then turned to pick up a cup of coffee, heard an impact, turned about abruptly and saw the motorcycle sliding down S. E. 26th Avenue (Pl. Exh. 9, p. 80).

In the Federal court case below, Mr. Samuels, the insurer's trial lawyer in the State court action, at one point, on direct examination indicated that the insurance company had investigated the case very carefully as borne out by the fact that there were no surprise witnesses (Pl. Exh. 10, p. 257). Yet, upon cross-examination he indicated he was surprised at the above testimony of Mr. Curulli because "in the statement we had, as I recall, he said he didn't know much . . ." (Pl. Exh. 10, p. 282).

Again, the trial was turning adversely for the insured. Here, an independent witness showed that Brewer was not running a red light, was not driving at an excessive speed and was not failing to keep a proper lookout or proper control. Here, an independent witness testified that both the car and the motorcycle were both in motion an instant before the impact and that each entered the opposite sides of the intersection at about the same time. Thus Pate could not have been stopped, if at all, for any appreciable time.

And still the insurer and its trial counsel refused to settle for the policy limits of $10,000.00.

Harry Stewart, an independent witness, and the only witness called by the defense other than Pate himself, testified that he was headed east on S. E. Powell Boulevard and had stopped for a red traffic light at the west curb line of S. E. 26th Avenue. He observed the motorcycle coming from the north on S. E. 26th Avenue and continued to watch it. He estimated the speed of the motorcycle at 25 miles per hour (Pl. Exh. 9, pp. 92, 93, 96, 97). After the impact and after the light turned green for him, Mr. Stewart pulled around the corner and stopped (Pl. Exh. 9, pp. 98, 99).

Thus, if the traffic light was red for Stewart, headed east on S. E. Powell Boulevard after the time of impact, it had to be still green for Brewer who was headed south on S. E. 26th Avenue (Pl. Exh. 36).

Stewart also testified that Pate's car was stopped 7 or 8 seconds before the impact. He also placed the impact in the *south-east* and not the *south-west* quadrant of the intersection, contrary to the physical facts of debris and contrary to the testimony of all parties and other witnesses (Pl. Exh. 9, pp. 96, 91, 95). With reference to how long Pate's car had been stopped Stewart admitted on cross-examination that after he first saw the motorcycle he continued to watch it and did not look back at the Pate car (Pl. Exh. 9, p. 97).

As just noted there were obvious weaknesses in Stewart as a witness. He was then followed to the stand by Pate who tried to change his testimony between deposition and trial and became "obviously nervous and became quite confused" as noted earlier.

As the foregoing facts indicate, it cannot be said that the insurer gave as much consideration to the interest of Pate, its insured, (who was facing a judgment for $75,000 plus $12,141.25) as it gave to its own interest of $10,000.

As the foregoing facts indicate, virtually all the risks were thrust upon the insured in the failure to settle before the jury returned with its verdict.

The trial began on Monday, March 30, 1964 and continued on March 31st and April 1st when it was submitted to the jury and on which date the jury returned its sealed verdict which was opened in open court on April 2, 1964 (Pl. Exh. 10, p. 120; Pl. Exh. 4). Thus there was ample time during the course of the trial for the insurer to have effected a settlement within policy limits.

The verdict was in the sum of $42,141.25, apparently being for general damages in the sum of $30,000.00 and special damages in the sum of $12,141.25 (Pl. Exh. 4).

With reference to the insurer's failure to settle *before* verdict this Court's attention is called to the following additional facts:

Immediately after the accident Pate gave the in-

surer a written authorization authorizing the insurer to investigate, negotiate, settle, deny or defend any claim arising out of the accident (Pl. Exh. 13).

Early in September 1962, less than two months after the accident the insurer set up a reserve of $10,00.00 for Brewer's injury (Pl. Exh. 15, 16, 17).

In the summer of 1963, about a year after the accident, a local claim committee of the insurer sitting in Portland, Oregon and composed of William E. Blitsch and Robert Knapp, each of whom were district claim superintendents, recommended that the Brewer claim be settled for $9,500.00 and indicated that the defense of contributory negligence was weak and the charge of negligence against the insured was strong (Pl. Exh. 14; Tr. 50-55). The local claim committee sent this recommendation to Mr. Edward Grant, the insurer's divisional claims superintendent, in its regional office in Salem, Oregon. Mr. Grant called in two other divisional claims superintendents and these three members in Salem were opposed to the recommended settlement if $9,500 (Tr. 57).

Thereupon Mr. Grant decided to have the Brewer file reviewed by its attorneys, Vergeer & Samuels in Portland (Tr. 183, 184).

Accordingly, Mr. Vergeer received the file and wrote an opinion letter dated August 28, 1963 to the insurer (Def. Exh. 24).

In his letter, he advised the insurer to refuse the claim. Contrary to facts which should have been in

the file, Mr. Vergeer assumed that the motorcycle entered the intersection on a yellow light intending to beat the red light; that the motorcycle was traveling at an excessive speed, that Brewer failed to keep a proper look-out or control. He also incorrectly assumed that the insured had been stopped an appreciable time before the impact. In his earlier report to the insurer, the insured himself had stated that he was making a left hand turn and did not see the motorcycle until it had entered the intersection and he, the insured, came to a stop just over the center line (Def. Exh. 21).

Further, in his opinion letter, Mr. Vergeer stated: "Undoubtedly the claimant will testify that the insured turned immediately in front of him and there was no possibility for him to swerve, *and if this were the case, then there would be liability.* This will present a jury question." (Emphasis added) (Def. Exh. 24, p. 2).

At the Federal court trial below, Mr. Vergeer admitted that at the time he wrote his opinion letter he did not have any statement or deposition of Brewer and did not have any deposition of the insured (Tr. 240). He also admitted that he did not know if there was any change of circumstances between the time he wrote his opinion letter and the time the case went to the jury (Tr. 238, 239). He also stated that he never changed his opinion but did not know what happened at the trial itself as he entrusted that to his partner, Mr. Samuels (Tr. 241).

Brewer did testify at the trial and in his deposition that the insured turned immediately in front of him and there was no possibility to swerve so as to avoid the collision (Pl. Exh. 9, pp. 17, 18; Pl. Exh. 26, pp. 19, 20).

The unmodified opinion letter was an uneducated guess that the jury would react against a motorcycle rider and was not a prudent appraisal to defend at the high risk of the insured (Def. Exh. 24).

Also at the Federal court trial below, Mr. Vergeer testified that in deciding to defend he did not consider there was only $10,000.00 coverage and that the insured would have to pick up the rest of it (Tr. 236). This was obviously not giving equal consideration to the interests of the insured.

Just before trial, the insurer offered to settle for $5,000.00, which was less than half of the provable specials and which if accepted (which it was not) would have saved the insurer a part of its coverage in an action seeking more than $80,000.00 from its insured (Tr. 18, 238).

FACTS AFTER VERDICT

As noted earlier, the Federal trial judge herein found that the insurer was careless and negligent and acted in total disregard of the interests of its insured and in bad faith in failing to consummate a settlement for the policy limits *after* verdict and prior to the denial of the motions for new trial (R. 124).

Conclusions of law and a judgment for the liquidated amount of the unpaid excess judgment plus attorney's fees was based thereon (R. 125-128).

In doing so, the appellee does not contend that the trial judge erred except as to the inadequate amount of attorney's fee.

On the other hand, the appellant apparently has attempted to asign such findings, conclusions of law and judgment, *in toto*, as error but does not state particularly wherein the same are alleged to be erroneous (Rule 18).

Consequently, appellee feels compelled to set forth a recital of facts *after* verdict.

After the verdict, Mr. Samuels, the insurer's trial counsel, filed a motion for new trial alleging various errors to have occurred at the trial (Pl. Exh. 7). At that time, he wrote a letter to the insurer showing that the motion was not well-founded nor filed in good faith. Among other things, he stated that the motion was filed "principally for psychological reasons in dealing with Attorney Ryan" and recommended authority from the insurer to pay the amount of coverage as he did not believe there was any possibility to compromise this figure (Pl. Exh. 21, pp. 5, 6).

The insurer did not follow this recommendation to pay the $10,000.00 after verdict and before its motions for new trial were denied (Tr. 287).

On April 3, 1964, the day after the verdict came

in, William E. Blitsch, the insurer's district claims superintendent in Portland, wrote as follows to Edward Grant, the insurer's divisional claims superintendent in Salem:

> "Ed, I just heard about this over the telephone. You have a copy of the file and the judgment was $42,000 and some odd dollars. I recommend that you give me authority immediately to pay our $10,000 so that our man's wages do not become attached."
>
> As far as Mr. Samuels is concerned in my brief conversation with him, we have no particular appeal and as you will recall by looking at the file, Bob and I recommended either $9,500 or $10,000 on this in a claim committee some time back. As far as I can see, we have no alternative but to pay our $10,000 and try to buy peace for our man." (Pl. Exh. 22).

The insurer did not follow this recommendation to pay the $10,000 after verdict and before its motions for new trial were denied (Tr. 73, 287).

After the initial motion for new trial was filed, the insurer's trial counsel shortly thereafter filed amended and supplemental motions for new trial allegedly based upon newly discovered evidence to the effect that Brewer used the false name of Lee D. Breuer at the trial, that he had a criminal record and that his wife had kicked him and injured his leg (Pl. Exh. 7).

On May 5, 1964, Judge Oppenheimer, the State trial judge, denied the motions for new trial.

Thereupon, the insurer's trial counsel wrote to the insurer and admitted that his motions for new trial were weak and ill-founded.

Among other things, he admitted that "unfortunately, we are required to admit that the newly discovered evidence is weak . . ."; that "in spite of all these various convictions and charges and guilty pleas, none of these could be used in circuit court to show that the man had been convicted of a crime . . ."; that "The court felt, quite rightly, that as far as could be shown by the defense, that the man's use of a different name did not prejudice the defendant, as had we known his correct name, such would have divulged nothing further that could have been shown to the jury as defensive material . . ." He also admitted that the alleged incident of the wife causing injury to Brewer was weak and ill-founded (Pl. Exh. 23, pp. 1, 2).

In this letter, the insurer's trial counsel stated that after the order overruling the motions for new trial, "We have attempted to obtain full release by payment of the amount of the coverage, but Attorney John Ryan states that his client will not allow him to do this." Therefore, the insurer's trial counsel advised the insurer to pay the amount of coverage plus interest and costs into the clerk of the court (Pl. Exh. 23, p. 2).

He further stated, "We have advised the defendant (the insured) as to the procedure taken herein, and know that he is fully prepared to file bankrupt-

cy if plaintiff (Brewer) levies on his salary (Pl. Exh. 23, p. 2).

On May 15, 1964, Pate, the insured, signed a debtor's petition (prepared by Mr. Samuels, the insurer's trial counsel) to be adjudged a bankrupt.

Pate died on May 17, 1964.

On May 18, 1964, Mr. Samuel's office caused the petition to be filed, not having been informed of Pate's death.

On May 21, 1964 the petition was dismissed by the bankruptcy court, on receipt of information that Pate's death preceded the filing of the petition (Pl. Exh. 46, R. 124, 125).

At the Federal court trial below, John Ryan, Brewer's attorney, testified that after the initial, amended and supplemental motions were filed and before Judge Oppenheimer denied these motions on May 5, 1964, he contacted Mr. Samuels on two occasions, and pursuant to authority from his client, Brewer, offered to settle the judgment for Pate's policy limits but that Mr. Samuels refused to do so (Tr. 21-25).

The first occasion, after the verdict, in which Mr. Ryan offered, on the telephone, to settle Brewer's case for the policy limits was on April 16, 1964 or the day before April 17, 1964 when Judge Oppenheimer held the first hearing on the motions for new trial. Mr. Ryan on behalf of, and with the authority

of Brewer, offered to settle the $42,000 judgment for Pate's policy limits (Tr. 21-24).

Mr. Samuels, the insurer's counsel, refused to settle (Tr. 24).

The second occasion on which Mr. Ryan offered to settle Brewer's case for the policy limits was on April 17, 1964, immediately after the first hearing on the motions for new trial, and while Mr. Ryan and Mr. Samuels were drivng back to Mr. Ryan's office in Mr. Samuel's automobile (Tr. 24, 25).

Again, Mr. Samuels refused to settle and said he would not settle with a perjurer (by which he meant he would not settle with a man who used two names) (Tr. 25).

At the Federal court trial below, Mr. Samuels denied categorically that Mr. Ryan or anyone else on behalf of Brewer, had ever offered to settle the Brewer case for the policy limits between the time of verdict and the denial of the motions for new trial (Tr. 267, 279, 280). On cross-examination, he was confronted with his sworn testimony in deposition regarding the Ryan offer of settlement after verdict, in which he stated, again and again, "I don't recall on that . . ." or "no recollection." (Tr. 280, 291, Pl. Exh. 29, pp. 31-34).

He did recall on the stand one or more automobile rides from the courthouse with Mr. Ryan and that he thought he used the word "perjury" or "something along that line on the part of his man on the

false name, but there was no discussion about any settlement at that time." (Tr. 267, 268).

He was also confronted with Mr. Ryan's letter of May 5, 1964, written and mailed the same evening after the motions for new trial were denied (Pl. Exh. 12).

He admitted reeciving this letter (Tr. 269). The letter read as follows:

> "'Dear Mr. Samuels:
> You have failed to accept or pay our offers to take the policy limits of your client *on the above judgment*, and, therefore, the previous offers to settle this case have been withdrawn and we are proceeding to collect the full amount of our judgment herein without further notice of our action herein." (Emphasis added)

Obviously the letter referred to offers of settlement "to take the policy limits of your client *on the above judgment.*" There could be no judgment until *after* verdict, so obviously, Mr. Ryan made offers (plural) to settle for policy limits *after* verdict. Mr. Samuels never refuted the receipt of the letter (nor the phraseology of the letter after he received it and long before the excess judgment action was commenced in Federal court).

Mr. Samuels further admitted on cross-examination that he took no initiative to settle the case for policy limits between verdict and denial of the motions for new trial (although, admittedly, as shown above, the motions were weak and ill-founded and

filed for psychological reasons in dealing with Attorney Ryan) (Tr. 286, 287).

He also admitted that if there had been an offer to settle for the policy limits it would have been the prudent, wise thing to have accepted that offer (further indicating that the motions were ill-founded) (Tr. 287).

In any event, the Federal trial judge, weighed the credibility and powers of recollection of Mr. Samuels and Mr. Ryan and elected to believe Mr. Ryan that there had been offers to settle for the policy limits after verdict and before denial of the motions for new trial. He relieved Mr. Samuels more gently than his direct and cross-examination called for (Tr. 321, 322).

As noted earlier, Mr. Samuels in his letter of May 11, 1964 stated that after denial of the motions for new trial, Brewer, through his attorney Ryan, refused to give a full release by payment of policy limits (Pl. Exh. 23, p. 2).

Finally, after denial of the motions for new trial, the insurer did not appeal but threw in the towel, paid its policy limits plus costs and interest into the registry of the court in partial satisfaction of the judgment (Pl. Exh. 34).

The insurer's attorneys then filed bankruptcy for its insured (Pl. Exh. 46).

ATTORNEY'S FEES

After both parties rested below, the question of the allowance of attorney's fees came up. In response to the Federal trial judge's question, "Does the defendant dispute that attorney's fees are allowed in this sort of action," the attorney for the insurer replied as follows:

> "MR. SKOPIL: I think we have no dispute with the fact that I am sure under the statute attorney's fees would be allowable. The only point we raised was in the preliminary stages of this, and that is the complaint was filed prior to the expiration of the six months, as required by the statute. Subsequently there was a motion for leave to amend to include attorney's fees, which was argued and allowed by the Court.
>
> Now, I feel that under the statute, if the plaintiff were to prevail, that he would, if he has met the requirements of that statute be entitled to attorney's fees." (Tr. 315).

Now, however, on this appeal the insurer takes the position that no attorney's fees at all were allowable.

Counsel for the administrator emphasized to the Federal trial judge that he had undertaken this case under a contingency fee arangement, which, pursuant to the Oregon State Bar regulations, would be 40% of the recovery. He also urged that in this type of case there was no doubt of the amount of recovery. It is either nothing or the liquidated sum of $31,979.98, which was the amount of the unpaid ex-

cess judgment and which was also the amount of the valid claim allowed by the probate judge against the insured's estate (Tr. 317). This amount and the computation of the attorney's fee thereon in the exact sum of $12,791.75 were carefully pleaded in the pretrial order (R. 84).

Counsel for the administrator also advised the Federal trial judge that the Oregon Supreme Court had approved of a contingency fee arrangement in a similar action against an insurer for violation of its contractual obligations (Tr. 318).

Contrary to this position, the Federal trial judge announced that he would not approve of a contingent fee arrangement but did not question the minimum bar schedule (Tr. 319, 318).

Subsequently, the Judge, in his findings, allowed counsel for the administrator an inadequate fee of only $4,000.00.

One of the appellee's grounds of cross-appeal herein is the repudiation by the Federal trial judge of the contingent fee arrangement, in the face of its prevailing allowance by the Oregon Supreme Court in a similar type of case, and the inadequacy of the award in a major, difficult case, such as this has been.

The record, herein, bespeaks of a long, complicated case involving much discovery, work and study and a case made more involved by some of the insurer's maneuvers (see for example, motion to dismiss, R. 7-25; opposition to supplemental complaint, R. 30-35).

POINTS AND AUTHORITIES

(1) Plaintiff, as the duly appointed, qualified and acting administrator of the estate of William Ira Pate, deceased, is the proper party plaintiff to maintain this action against Pate's insurance company for failure to settle the personal injury claim and action against Pate within Pate's policy limits.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);

Jessen v. O'Daniel, 210 F. Supp. 317 (DC Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'-Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);

Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295 (4th Cir., 1961);

Sweeten v. National Mutual Insurance Co. of D. C., 233 Md. 52, 194 A.2d 817 (1963).

(2) Having been duly appointed administrator of Pate's estate and Judge Dickson of that Court having examined and allowed the claim of Brewer, plaintiff, in the personal injury action, in the sum of $31,979.38 (representing the unpaid balance of the excess judgment against Pate), the plaintiff administrator herein is under a fiduciary duty to the estate and to its creditors and heirs to pursue this action against the insurer and to collect all that is owed to the estate.

ORS 116.130;

Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295, 296 (4 Cir., 1961);

Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);
Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);
Also see: Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966).

(3) It is not necessary that the estate should first pay this claim of $31,979.38 on account of the unpaid excess personal injury judgment against Pate or that it should have sufficient assets to do so, before the administrator of Pate's estate can maintain this action against Pate's insurer.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);
Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295 (4 Cir., 1961);
Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);
Sweeten v. National Mutual Insurance Co. of D. C., 233 Md. 52, 194 A.2d 817 (1963).

(4) Payment of excess personal injury judgment by insured or his estate is not a pre-requisite to maintenance of an action against the insured as mere excess liability of the judgment establishes damages and is the measure thereof. This is analogous to the gen-

eral rule that a plaintiff who incurs a reasonable medical or hospital expense may recover against negligent defendant therefor even though such expense was not paid, at all, or not paid by plaintiff. Also to require prepayment of excess by insured or his estate would be a windfall to an insurer with insolvent insureds and would induce an insurer to be less responsive to the fiduciary duties owed to its insureds.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);

Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);

Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295 (4 Cir., 1961);

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);

Gray v. Nationwide Mutual Ins. Co., 422 Pa. 500, 223 A.2d 10 (1966);

Brown v. Guarantee Insurance Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1958);

Wesing v. American Indemnity Co., 127 F. Supp. 775 (D.C. Mo., 1955);

Alabama Farm Bureau Mut. Casualty Insurance Co. v. Dalrymple, 270 Ala. 119, 116 So. 2d 924 (1959);

Sweeten v. National Mutual Insurance Co. of D. C., 233 Md. 52, 194 A.2d 817 (1963);

Southern Fire & Casualty Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952);

Cary v. Burris, 169 Or. 24, 127 P.2d 126 (1942).

(5) The Oregon Supreme Court has held that an insurer owes to its insured the duty of due diligence and good faith, and, in determining whether to settle claims against the insured, the insurer must act as if it were liable for the entire judgment that might eventually be entered against the insured. In addition, only a decision in the exercise of due diligence to reject an offer of settlement is deemed as made in good faith.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);

American Fidelity & Casualty Co. v. L. C. Jones Trucking Co., — Okla. —, 321 P.2d 685, 687 (1957);

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 5 Cal. Rep. 488 (1960);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);

Gray v. Nationwide Mutual Ins. Co., 422 Pa. 500, 223 A.2d 8 (1966);

See also:

7A Appleman, "Insurance Law and Practice," §§ 4711, 4712.

(6) Basis of liability, in both contract and tort, arises out of the insurance contract which gives the insurer the exclusive right to negotiate settlement of claims and defend actions against the insured. The insurer stands as a fiduciary or trustee or agent to

its insured and its duty of due care and good faith are judged in that context and under the policy.

Evans v. Continental Casualty Co., 40 Wash. 2d 614, 245 P.2d 470, 480 (1952);

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);

Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont. 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60, 64, 65 (9th Cir., 1964);

38 Am Jur 661, 662, "Negligence," § 620;

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(7) Where insured is sued for an amount in excess of his coverage there is a necessary conflict of interest between insured and his insurer and courts take this into consideration in determining if insurer improperly rejected offer of settlement and therefore closely scrutinize the insurer's conduct.

Radcliffe v. Franklin National Insurance Co., 208 Or 1, 21, 22, 298 P.2d 1002 (1956);

Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 25 (6 Cir., 1960);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(8) In actions of this kind mere terminology of "negligence" and "bad faith" is not determinative. It is rather the factual situation which is significant in light of the duty which rests on the insurer

under the policy. The terms are often used interchangeably and negligent conduct is deemed indicative of bad faith.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);
7A Appleman, "Insurance Law and Practice," 576, 577, § 4712.

(9) Bad faith in this type of case does not mean fraud, nor is it the equivalent of fraud and need not be proved by clear and convincing evidence as preponderance of evidence is sufficient. Bad faith is a term applied to a great variety of acts or omissions which equity regards as wrongful, such as failure to give equal regard to the best interest of the insured or the intentional disregard of insured's financial interest in the hope of escaping the full responsibility imposed on the insurer.

American Fidelity & Cas. Co. v. Greyhound, 258 F.2d 709, 713, 714 (5 Cir., 1958);
Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(10) Where insurer chose to ignore strong evidence of negligence on insured's part as revealed at the trial (Pate skidded some 11 or 12 feet from his side of the road some 5 feet onto Brewer's side of the road while attempting a left turn in front of

Brewer) and where proof of contributory negligence was weak or non-existent and where insurer knew injuries were serious and permanent and provable specials alone exceeded policy limits and insurer still refused to settle for policy limits, such conduct proves negligence and bad faith on part of insurer.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);

Western Cas. & Surety Co. v. Fowler, — Wyo. —, 390 P.2d 602 (1964);

Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21 (6 Cir., 1960);

American Fidelity & Casualty Co. v. G. A. Nichols, 173 F.2d 820 (10 Cir., 1949);

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 5 Cal. Rep. 488 (1960);

Alabama Farm Bureau Mut. Cas. Ins. v. Dalrymple, 270 Ala. 119, 116 So. 2d 924 (1959).

(11) In good faith, insurer may not refuse settlement if it knows it has no more than 50-50 chance of winning case and that if there is a verdict against the insured it would exceed policy limits (see admissions of insurer's attorney thereon in Plaintiff's Exhibit 21, p. 5).

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);

See also:

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960).

(12) Where primary negligence of insured is clear (he skidded some 11 or 12 feet from his lane of traffic some 5 feet into Brewer's lane of traffic while attempting a left turn in front of Brewer) and where evidence of contributory negligence is weak or non-existent and where injuries were serious and permanent and special damages exceeded policy limits there would be a clear showing of bad faith for failure to settle even if insurer's lawyer had estimated that insured had better than 50-50 chance for defense verdict which estimate he could not and did not make here (Pl. Exh. 21, p. 5).

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 401, 5 Cal. Rptr. 488 (1960).

(13) In the present situation, where a defendant's verdict was doubtful as best and the trial was going adversely against insured and where the injuries were admittedly serious and permanent, the amount of provable specials exceeded the policy limits and where the general damage sought was $75,000.00, the insurance company, in rejecting a $10,000.00 offer to settle thrust virtually all of the risk upon the insured and did not consider his best interest equally with its own. Such conduct constitutes bad faith.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 22, 40, 43, 298 P.2d 1002 (1956);
Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);
Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 34 (6 Cir., 1960);
Springer v. Citizen's Cas. Co. of N. Y., 246 F.2d 123, 128 (5 Cir., 1957).

(14) Bad faith indicated where insurer is gambling against a larger verdict being imposed on its insured while trying to save a comparatively smaller amount of its own money.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 34 (6 Cir., 1960);
Springer v. Citizen's Cas. Co. of N. Y., 246 F.2d 123 (5 Cir., 1957);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(15) The degree of due care which must be exercised by an insurer in rejecting an offer of settlement within policy limits is commensurate with the degree of risk of an excess judgment against its insured and the insurer must act as if it were liable for the entire judgment that may eventually be rendered.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(16) Where insurer rejects reasonable offer of settlement within policy limits such refusal is a manifestation of bad faith towards insured's interest.

J. Spang Baking Co. v. Trinity Univ. Ins. Co., 45 Ohio Law Ab. 577, 68 N.E.2d 122, 126 (1946);
Henke v. Iowa Home Mutual Casualty Co., supra;
Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 394, 5 Cal. Rep. 488 (1960);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1960).

(17) Bad faith and negligence may be shown by direct or circumstantial evidence.

Radcliffe v. Franklin National Insurance Co., supra, 298 P.2d 1002 (1956).
Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 25, 35 (6 Cir., 1960).

(18) Actual verdict of $42,141.25 is evidence of what the insurer may have anticipated if it had given the offer of settlement proper consideration.

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 401, 5 Cal. Rep. 488 (1960);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(19) Insurer had absolute authority to settle case within policy limits and insured had no power to either compel insurer to make such settlement or to prevent it from doing so.

7A Appleman, "Insurance Law and Practice," 576, § 4711;

Radcliffe v. Franklin National Insurance Co., supra, 298 P.2d 1002 (1956);

Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A.2d 57, 62 (1947).

(20) Insurer's improper rejection of offer of settlement within policy limits is not excused because insured did not demand acceptance as insurer had full power in the matter and must perform its professional duty without being activated by insured.

Highway Insurance Underwriters v. Lufkin-Beaumont Motor Coaches, — Tex. Civ. App. —, 215 S.W.2d 904, 929 (1948);

State Farm Mutual Automobile Insurance Co. v. Jackson, 346 F.2d 484, 490 (8 Cir., 1965);

7A Appleman, "Insurance Law and Practice," 553, § 4711.

(21) Insurer has even greater duty to accept offer of settlement after judgment than offer of set-

tlement before verdict, both of which were within policy limits (as was true here), since under such circumstances, motion for new trial, even if successful, could only benefit insurer. Thus to rely on motion for new trial, facts for allowance must be very strong and chances of success correspondingly greater than chances of failure which was not so here.

Hazelrigg v. American Fidelity & Cas. Co., 241 F.2d 871, 873 (10 Cir., 1957) (dictum);

7A Appleman, "Insurance Law and Practice," 557, § 4711.

(22) Where liability of insured is clear, as it was here, both before verdict and after verdict, it is evidence of bad faith if insurer fails to take the initiative to make an earnest and prompt attempt to settle the case for its reasonable value.

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 98 N.W.2d 168, 174 (1959).

(23) Negligence and bad faith of attorneys retained by insurer is imputed to insurer.

Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A.2d 57, 61 (1947);

Attleboro Man'f Co. v. Frankfort Marine Acc. & Plate Glass Ins. Co., 240 F. 573 (1 Cir., 1917);

Smoot v. State Farm Mutual Automobile Ins. Co., 299 F.2d 525 (5 Cir., 1962).

(24) Both state and federal courts within the

intendment of ORS 736.325, have been liberal in allowing attorney's fees, at both trial and appellate levels, to prevailing plaintiffs in various actions for violations by insurers of the terms of their policies. The action here was for the violation by insurer of its contractual obligation to solely control settlements under its policy and attorney's fees are allowable herein.

Pl. Exh. 11—insurance policy;
State v. Claypool, 145 Or. 615, 28 P.2d 882 (1934);
Tierney v. Safeco Ins. Co. of America, 216 F. Supp. 590 (D.C. Or., 1963);
Staff Jennings, Inc. v. Firemen's Fund Ins. Co., 218 F. Supp. 112 (D.C. Or., 1962);
Denley v. Oregon Auto Ins. Co., 151 Or. 42, 47 P.2d 245, 47 P.2d 946 (1935);
Journal Publ. Co. v. General Cas. Co., 210 F.2d 202, 204 (9 Cir., 1954);
Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
American Fidelity & Casualty Co. v. Greyhound, 258 F.2d 709, 717, 718 (5 Cir., 1958);
American Fire & Casualty Co. v. Davis, — Fla. —, 146 So. 2d 615 (1962).

(25) The district court erred in not abiding by a contingent fee arrangement, valid in Oregon, and in only allowing an attorney's fee in the sum of $4,000.00 instead of in the sum of $12,791.75 as prescribed by Minimum Fee Schedule of the Oregon State Bar.

Denley v. Oregon Auto Ins. Co., 151 Or. 42, 47 P.2d 946 (1935);
ORS 9.010;
ORS 41.360 (15).

SUMMARY OF ARGUMENT

The trial court did not err in allowing judgment for the full amount of the excess judgment plus attorney's fees but did err in not also basing his judgment on the further ground that the insurer had acted negligently and in bad faith *before* the verdict as well as *after* the verdict and did err in allowing only $4,000.00 instead of $12,791.75 as attorney's fees below.

ARGUMENT

The facts, mostly in the form of written exhibits and the transcript (Pl. Exhs. 9 and 10) of the State court trial, clearly shows that the insurer acted negligently and in bad faith both *before* verdict and *after* verdict in not settling within policy limits.

Extensive argument thereon should not be necessary. The Federal trial judge based the judgment against the insurer solely on the negligence and bad faith of the insurer *after* veridct. As to what transpired *before* verdict, he found was not negligence or bad faith but rather the exercise of reasonable care, skill and diligence of a prudent casualty insurance company in its decision to submit the case to the jury (R. 123).

Such findings as to the conduct of the insurer *before* verdict were clearly erroneous.

The conduct of the insurer *after* verdict was so shockingly callous in its disregard of the insured's interest that the Judge may have felt he would be prudent and play it safe in forestalling a costly and time-consuming appeal by solely basing the judgment against the insurer thereon. Perhaps, he reasoned that no insurer would want such outrageous conduct permanently spread upon the pages of an appellate court decision. If so, he was "out-reasoned" by State Farm; for here we are.

The Federal trial judge in his findings in favor of the insurer *before* verdict was clearly erroneous as shown by the recital of facts heretofore made. As there pointed out, and as shown by exhibits including the transcript of the State court trial, the insurer did not act prudently and with equal regard for the interests of the insured. On the contrary, it thrust the major portion of the risk on its insured in the hope (fatal as it proved to be to the insured) of saving a part or all of its $10,000.00 coverage.

In that connection, it will be recalled that one of the insurer's counsel, in August 1963 some 7 months before trial, wrote an opinion letter to reject Brewer's claim and go to trial (Def. Exh. 24). This opinion letter, as to facts already in the insurer's file or which should have been, misconstrued the same or negligently assumed that the motorcycle entered the intersection on a yellow light intending to beat a red

light and that the motorcycle was travelling at an excessive speed and that Brewer failed to maintain a proper lookout or control. It also assumed incorrectly that the insured had been stopped an appreciable time before impact.

It ignored or played down the cold, hard facts that the insured had skidded 11 or 12 feet from his side of the road some 5 feet across the center and across the path of the oncoming motorcycle thereby failing to yield the right of way and all while the insured was attempting a left turn in the face of the oncoming motorcycle (Def. Exh. 24).

These cold, hard facts appeared in the official police investigating report to which the insurer had access (Def. Exh. 20). Also, if the insured were stopped an appreciable time why did he not back up and out of the motorcycle's rightful lane of traffic?

Mr. Vergeer, the writer of the opinion letter, admitted below on cross-examination that at the time he wrote the opinion letter he had no statement or deposition from Brewer and no deposition from Pate, the insured (Tr. 240). He thus had no way to appraise the story of either party under oath. He thus had no way to appraise the kind of a witness either party would make under oath and under cross-examination. As it turned out before verdict, Brewer made an excellent witness while Pate became nervous and confused as he tried to change his story between deposition and trial (Pl. Exh. 21; Pl. Ex. 9, pp. 108-117—cross-examination of Pate).

Mr. Vergeer also admitted below in cross-examination that he did not know if there were any changes of circumstance between the time he wrote his letter and some 7 months later when the case went to the jury (Tr. 238, 239). He also further stated that he never changed his opinion to submit the case to a jury (nor did the insurer) but he did not know what happened at the trial itself as he turned the trial of the case over to his partner, Mr. Samuels (Tr. 241).

Like a stock broker predicting the market 7 months in advance, Mr. Vergeer hedged in his opinion letter when he stated, "Undoubtedly the claimant will testify that the insured turned immediately in front of him and there was no possibility for him to swerve, *and if this were the case, then there would be liability.* This will present a jury question" (Def. Exh. 24, p. 2; emphasis added). Not only did the claimant (Brewer) so testify but the skid marks, debris and other physical facts bore out his testimony.

Examination of the unmodified opinion letter shows that it was, in good measure, an uneducated guess on how a jury would violate its sworn duty to decide the facts but instead would prejudicially and viscerally react against a motorcycle rider (Def. Exh. 24). Such an appraisal was far less prudent than the appraisal of the insurer in the *Crisci* case to let the jury pick and choose between the testimony of psychiatrists on opposite sides of the case. (*Crisci* v. *The Security Insurance Company of New Haven*, 58 Cal. Rptr. 73, 426 P.2d 173, 178 (1967).

The opinion letter also over-rode the recommendation of Mr. Blitsch and Mr. Knapp, two of the insurer's district claims superintendents, to settle for $9,500.00 (Tr. 58). Also, at the time Mr. Vergeer received the file, preparatory to writing his opinion letter, he received a cautionary letter from Mr. Knapp that there is negligence on the part of the insured with only "some possible negligence" on the part of the claimant, but the severity of the injuries overshadows the element of contributory negligence and it would appear to be a jury question" (Def. Exh. 2). Obviously, Mr. Vergeer had more faith in reading his crystal ball (clouded as it was) on the jury's adverse reaction to a motorcycle and his hunch that the jury would not do what jurors are supposed to do (Def. Exh. 24).

Right before trial, the insurer offered to settle for $5,000.00, which was not accepted. This offer would appear to be an attempt to save a part of its coverage. In making such an unacceptable offer, in an attempt to save a few dollars of its own, the insurer was thrusting virtually all the risk on the insured and was not thereby giving the rightful interest of its insured equal consideration with its own, thereby demonstrating its bad faith before verdict (See P & A, (5) through (18), supra).

After the trial started, events began to go badly for the insured. The many instances in which the trial of the case turned "sour" for the insured have heretofore been detailed under the "Statement of Facts." There is no need to repeat those details. They

are verified by the transcript itself of the State court trial (Pl. Exhs. 9, 10).

The insurer still had a chance to settle for policy limits and save the day for its insured (Tr. 18).

And still the insurer remained adamant in its refusal to settle for policy limits before verdict.

In sticking to its unreasonable refusal to so settle, the insurer violated its obligation under the sole control it had over such a settlement by the contractual terms of its policy. Its violation of its sole control over settlement were shown by its negligence and bad faith in refusing to settle when it realized, or should have realized, that the opinion letter was not, at its conception, prudently based on facts (existent or non-existent) and that the continued refusal to settle was not based upon the turn of events adversely to its insured, at the trial, and that the true course of events demanded, in the exercise of due care and good faith, a settlement for the policy limits (See P&A (5) through (18), *supra*).

Little has been said in this argument about applying the foregoing Points of Law on the duty of the insurer to use due care and good faith in refusing to settle within policy limits.

There are only two Oregon Supreme Court decisions in excess judgment cases. They are *Radcliffe* v. *Franklin National Insurance Co.*, 208 Or. 1, 298 P.2d 1002 (1956) and *Kuzmanich* v. *United Fire & Casualty Co.*, 242 Or. 529, 410 P.2d 812 (1966). No at-

tempt is made in this brief to pick and quote at random various sentences or phrases therefrom. Instead the principles, enunciated by both decisions, and supported by cases from other jurisdictions, have been digested under the foregoing Points and Authorities.

The various nuances and application of the principles of law that the insurer not act negligently and in bad faith can be readily applied by this Court to the facts proved herein.

In any event, it should be sufficient to caution that "bad faith" in an excess judgment case does not mean "fraud" or the equivalent of "fraud." Rather, "bad faith" is applied to a great variety of acts or stopped an appreciable time why did he not back up omissions where the courts regard as wrongful as such conduct as failure to give equal regard to the best interest of the insured or the intentional disregard of the insured's financial interest in the hope of escaping the full responsibility imposed on the insurer (See P & A (9), *supra*).

It should also be enlightening to call attention to two recent cases, in particular, on the liability of an insurer in an excess judgment situation. These cases are: *Gray* v. *Nationwide Mutual Ins. Co.*, 422 Pa. 500, 223 A.2d 10 (1966) and *Crisci* v. *The Security Insurance Company of New Haven*, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

The *Gray* case affirms the modern, better-resolved viewpoint, that pre-payment of the excess judgment is not a pre-requisite to an excess judgment action

and is *aggiorimento* in opening the door to the fresh breezes of a direct assignment of the insured's cause of action for wrongful conduct of the insurer to the injured claimant.

The decision of the highly-regarded California Supreme Court in the *Crisci* case elucidated and clarifies what is meant by the duty and obligation of the insurer not to act negligently and in bad faith in refusing to settle within policy limits. This decision is in accord with, and builds upon, the decisions of the Oregon Supreme Court in the earlier *Radcliffe* and *Kuzmanich* decisions cited above.

The *Crisci* decision is especially helpful on the application of the principle of "bad faith" and "negligence" on the part of the insurer. The *Crisci* decision is likely to become a "landmark case" in the field of excess judgment litigation just as the two decisions by the same eminent Court in *Greenman* v. *Yuba Power Products*, 377 P.2d 897 (Cal., 1962) and *Vandermark* v. *Ford Motor Co., et al*, 391 P.2d 168 (Cal., 1964) have become landmark decisions in the field of products liability.

On the subject of damages and attorney's fees allowable herein, the discussion must be more extensive on both the facts and the law. This is or, because, at the conclusion of the testimony below, the Federal trial judge requested more information on both subjects and the insurer has purportedly specified errors on both subjects (Tr. 315 et seq). Shortly following the Federal court trial below, the writer,

who was also trial counsel for appellee below, submitted a memorandum on the law of damages and attorney's fees some 15 pages in length (R. 129-144). There is no need or space herein for that much detail.

DAMAGES

With reference to damages, in allowing recovery for the full amount of the unpaid judgment even though the plaintiff or insured in an excess judgment action has not paid the same or any part thereof or is without assets to do so, one of the leading cases was decided by this Court in 1964, in affirming Judge Jameson of the Montana District Court. That case is *National Farmers Union Property and Casualty Co.* v. *O'Daniel, Adm.*, 329 F.2d 60 (9 Cir., 1964) affirming *Jessen* v. *O'Daniel*, 210 F. Supp. 317 (D.C. Mont., 1962).

The *O'Daniel* case is important for several reasons. In the first place, the facts therein are similar to those in the case at bar. In the second place, the insurer therein relied strongly on the case of *Harris* v. *Standard Accident & Ins. Co.*, 297 F.2d 627 (2 Cir., 1961) as does the insurer herein.

In *O'Daniel*, the District Court distinguished and refused to follow *Harris* and this Court, although its attention was called to *Harris* ignored *Harris* and instead cited *Brown* v. *Guarantee Insurance Co.*, 155 Cal. App. 2d 670, 319 P.2d 60 (1958) in upholding the right of the estate to maintain its action without paying or being able to pay the excess judgment in

the sum of $25,000.00. On this score and on the subject of damages the Ninth Circuit ruled as follows:

> "National (insurer) contends that this action cannot be brought until the estate has paid the excess judgment. Although there is a conflict among the authorities on this question, a more modern and better reasoned view is that the cause of action arises when the insured incurs a binding judgment in excess of the policy limits. Likewise, we see little merit in the contention that the estate has not been damaged beyond its value, even though the judgment may exceed the value of the estate by more than one hundred per cent. It is obvious that if National were to reimburse the estate for the value of the assets paid to Jessen, Jessen could levy on the estate for the reimbursement money and there would still be no assets left in the estate. This also disposes of the contention that Jessen is the real party in interest and not a proper party. The estate is the party that was damaged by the personal injury judgment and the estate is the party that brought the cross complaint against National." (329 F.2d 60, 66)

The facts in *O'Daniel* were briefly these: Jessen, while driving his car, was injured in Montana when he had an accident with a truck owned by O'Daniel. Jessen was awarded $35,000.00 in his State court action against O'Daniel. At the time of the accident O'Daniel had a $10,000.00 liability policy on the truck. The State court judgment of $35,000.00 was affirmed by the Montana Supreme Court. Thereafter, National (O'Daniel's insurer) paid Jessen the full

$10,000.00 coverage plus court costs and interest. O'Daniel died without having made any payment himself on the judgment. After filing a claim for the excess of the judgment over the $10,000.00 against O'Daniel's estate, Jessen brought suit in the Montana State court on the judgment against O'Daniel's estate. The administrator of the estate answered and filed a cross complaint against National for negligence and bad faith in failing to settle the personal injury case within the policy limits. National removed the case to Federal court on diversity grounds.

The Federal district court awarded Jessen $25,000.00 on his complaint and awarded the administrator $23,000.00 on his cross complaint (The Court deducted $2,000.00 from the amount awarded the administrator because at the time of trial O'Daniel was willing to contribute $2,000.00 to settle the case).

To the same effect in holding that incurring a binding judgment in excess of policy limits is the damage and that payment or the ability to pay all or part of the same is not a pre-requisite to maintaining an action against the insurer for wrongful refusal to settle see: *Henke* v. *Iowa Home Mutual Casualty Co.*, 250 Iowa 1123, 97 N.W.2d 168 (1959); *Lee* v. *Nationwide Mutual Insurance Co.*, 286 F.2d 295 (4 Cir., 1961); *Sweeten* v. *National Mutual Insurance Co. of D. C.*, 233 Md. 52, 194 A.2d 817 (1963). Other cases on the same points are collected under P & A (3), (4), *supra.*

The insurer herein relies upon *Harris* v. *Standard*

Accident & Insurance Company, 297 F.2d 627 (2 Cir., 1961) in support of its contention that the insured has not been damaged because the excess judgment has not been paid and the insured's estate is without sufficient funds to do so.

In *Harris*, the action was by the trustee in bankruptcy. The District Court awarded the trustee $89,000.00, the full amount of the unpaid excess judgment.

On appeal, the Second Circuit by a divided panel, reversed on the ground of failure to show any damages since the insureds were insolvent before the excess judgment was rendered, did not pay any part of it, and were discharged in bankruptcy from any future obligation to pay it.

The court attempted to distinguish the California *Brown* case (*supra*) by saying that in *Brown* there was no evidence that the insured was insolvent before the excess judgment as were the insureds in *Harris*.

The court went on to say that if the insured was not insolvent before the excess judgment and if he had any excess of assets over liabilities exclusive of the excess judgment, then the insured could recover the full amount of the excess judgment because a full recovery thereof would be necessary to make the insured whole; that is to place him in a position where his net assets (however small) are as great after as before the rendition of the excess judgment (297 F.2d 632).

At this juncture, we might note that there is no evidence in the case at bar that Pate was insolvent before the $42,141.25 judgment was rendered. To the contrary, as the evidence herein shows, he was solvent (exclusive of the excess judgment), was employed as a truck driver and had been so employed for a period of 24 years (Pl. Exh. 9, pp. 100; Pl. Exh. 46). The Federal district judge here in his Findings of Fact (6) found that "Pate's assets exceeded his liabilities by the sum of approximately $2,000.00" and that he claimed these assets as exempt from the claims of creditors under the Oregon exemption law in his bankruptcy petition. The only obligation, other than the unpaid judgment, was a single debt in the sum of $100.00 (R. 124, 125).

Under the agreed facts in the pre-trial order herein it is stipulated that the appraised value of the assets of Pate's estate apart from the value of this law action against State Farm is in the sum of $461.18. Appellant in its brief sets forth the Oregon Probate Code on preferred and ordinary claims and attempts to infer that there are preferred claims herein (App. Br. pp. 13, 14). There is not a scintilla of evidence in the record of any such preferred claims. The only evidence of a claim against the Pate estate is the unpaid excess judgment claim of $31,979.38 (R. 76; Pl. Exh. 32).

Apart from the unpaid excess judgment claim, there are some net assets in the Pate Estate and apart from the excess judgment Pate was not insol-

vent in life or upon death. Thus even under the reasoning in *Harris* the estate of the insured herein has been damaged by the full amount of that judgment.

Also in *Harris* the court grounded its ruling of no damages on a peculiar New York rule of damages which does not exist in Oregon. This peculiar rule is to the effect that there must be proof of actual loss and that an injured party cannot recover for unpaid medical expenses if there is a showing that he is unable to pay them. Oregon has no such oddity in its law. (*Cary* v. *Burris*, 169 Or. 24, 127 P.2d 126 (1942)).

Apparently no other circuit court has followed the *Harris* case and many courts have either distinguished, ignored or refused to adopt its holding. See for example: *O'Daniel, supra; Sweeten, supra; Anderson* v. *St. Paul Mercury Indemnity Co.*, 340 F.2d 406 (7 Cir., 1965); *Wooten* v. *Central Mutual Ins. Co.*, — La. —, 182 So. 2d 146 (1966); *Smoot* v. *State Farm Mutual Automobile Ins. Co.*, 299 F.2d 525 (5 Cir., 1962).

In the *Wooten* case, the court refused to follow *Harris* and noted, "The other federal circuits have expressly refused or have failed to follow the cited 1961 decision rendered by a divided panel in *Harris* v. *Standard Accident Co.*, . . . Further it has been pointed out that the authorities upon which *Harris* relies are at least partially inapplicable, overruled or otherwise nonpersuasive . . ." (182 So. 2d 149, 150).

Harris has been criticized in a number of law review notes. See for example, 60 Mich. L. Rev. 517 and 41 Texas L. Rev. 595.

The Oregon Supreme Court has not directly passed upon the issue of damages presented here. However, we know from reading the decision in *Kuzmanich* v. *United Fire & Casualty Co.*, 242 Or. 529, 410 P.2d 812 (1966) that it was an action by an administrator of a deceased insured's estate to recover "for the unpaid balance of $15,000.00 plus attorney's fees, claiming defendant was negligent and did not exercise good faith in failing to settle Marin's claim within policy limits." The court assumed, without deciding, that the administrator could bring the action without first paying, or being able to pay, the excess judgment.

Also, we know from reading both *Kuzmanich* and *Radcliffe* v. *Franklin National Insurance Co.*, 208 Or. 1, 298 P.2d 1002 (1956) that the Oregon court will scrutinize the conduct of an insurer in an excess judgment case and will insist that the insurer give the insured's interest at least equal consideration with its own and that the insurer is a fiduciary or trustee or agent of the insured.

There is nothing in the Oregon decisions to indicate that the Oregon Supreme Court would favor or give a windfall to an insurer who happened to have an insolvent for an insured. Nor is there anything to indicate that the Oregon court would offer any inducement to an insurer not to abide by its duty

as a fiduciary because it had an insolvent insurer.

Also, in Oregon (as elsewhere) the administrator is bound by a fiduciary duty to collect all that is owing to the insured's estate (ORS 116.130; see also *Lee* v. *Nationwide Mutual Insurance Company*, 286 F.2d 295, 296 (4 Cir., 1961).

CREDIBILITY OF WITNESSES

The appellant purportedly assigns as error the proposition that interest, bias and inconsistency of a witness must be considered in evaluating his testimony (App. Brief, p. 3). If this is a valid specification of error then appellee has no quarrel with it.

As is obvious in the trial below the Federal trial judge did consider the interest, bias and inconsistencies, if any, of the witnesses. See the Judge's comments thereon at the conclusion of the trial (Tr. 321). After hearing the cross-examination of Mr. Samuels, the insurer's trial counsel in the State court, it is amazing the trial judge did not rebuke him but instead let him down very gently (Tr. 272 et seq; Tr. 321).

Appellant is in error in its brief (p. 16) in stating that at the trial Mr. Ryan was inconsistent between deposition and trial in indicating that offers of settlement were made during an automobile ride. In fact, he testified to one such telephone offer on April 16, 1964 and to another offer, the next day, in an automobile ride with Mr. Samuels back from the

courthouse after they first argued the motions for new trial (Tr. 23-25).

ATTORNEY'S FEE ALLOWABLE

As noted earlier, under the Statement of Facts, counsel for the insurer, after both sides rested below, conceded that if the plaintiff were to prevail he, the plaintiff, would be entitled to an attorney's fee under the statute (Tr. 315). The insurer now contends that it was improper to allow any attorney's fees to plaintiff below because this was a tort action. As we will presently show, whether the action was in contact or tort has no bearing on the allowance of an attorney's fee under ORS 736.325. The Oregon Legislature never so limited recovery.

The essential parts of ORS 736.325 reads as follows:

> "Recovery of attorney fees in action on policy. (1) If settlement is not made within six months from the date proof of loss is filed with an insurance company . . . and a suit or action is brought in any court of this state upon any policy of insurance of any kind or nature . . . and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such suit or action, then the plaintiff, in addition to the amount that he may recover, shall be allowed and shall recover as part of his judgment such sum as the court may adjudge to be reasonable as attorney's fees."

This Court will note that the Legislature did not

say "a suit or action ex contractu" or a "suit or action ex delicto." It said "a suit or action" without qualification as to its kind or nature.

The gravamen of the course of action herein was that the insurer violated the contractual terms of its policy giving its sole control to settle in that it negligently and in bad faith failed to settle within policy limits. Obviously it was an action upon the policy within the meaning of the statute. If there had been no policy there would have been no action.

Courts which have had occasion to consider, for one reason or another, whether an action on an excess judgment is in contract or in tort have arrived at differing answers and analyses. Some of these courts indicate that the insurer's duty arises from an implied covenant in the policy to act reasonably and in good faith in effecting settlements within the policy limits.

Recently the California Supreme Court in the *Crisci* excess judgment case indicated that the action was in both contract and tort and not exclusively in either category (426 P.2d 173). For cases emphasizing covenant aspects see *Gray* v. *Nationwide Mutual Ins. Co.*, 422 Pa. 500, 233 A.2d 10 (1966); *American Fire and Casualty Company* v. *Davis*, — Fla. —, 146 So. 2d 615 (1962); *In re Layton*, 221 F. Supp. 667 (D.C. Ariz., 1963); *American Fidelity & Casualty Co.* v. *Greyhound Corp.*, 258 F.2d 709 (5 Cir., 1958).

In any event it is not necessary for this Court to

"pigeon-hole" this case because so far as the attorney's fee statute is concerned the prevailing plaintiff in any kind of an action upon the policy is entitled to attorney's fees where there has been no settlement within six months from proof of loss or commencement of the action.

In a case where the policy does not require filing of a proof of loss, as is true here, commencement of the action is equivalent to demand for payment and renders ORS 736.325 applicable. (*State* v. *Claypool*, 28 P.2d 882; *Journal Pub. Co.* v. *General Cas. Co.*, 210 F.2d 202 (9 Cir., 1954).

As noted earlier, there are only two Oregon excess judgment cases namely *Radcliffe* and *Kuzmanich*. In neither case was the matter of attorney's fees in issue. However, in *Kuzmanich* the court noted that the action was to recover "for the unpaid balance of $15,000 plus attorneys' fees, claiming defendant was negligent and did not exercise good faith in failing to settle Marin's claim within policy limits." The Court thus assumed, without deciding, that attorney's fees were recoverable in an excess judgment action.

There are, however, numerous decisions by both state and federal courts which have liberally interpreted ORS 736.325 so as to allow attorney's fees to prevailing plaintiffs in a great variety of actions against insurers. (SeeP. & A. (24), *supra*).

For direct decisions on attorney's fee in an excess judgment case we must go outside Oregon.

In *American Fidelity & Casualty Co.* v. *Greyhound*, 258 F.2d 709 (5 Cir., 1958) the circuit court faced the problem of whether the insured in an excess judgment case could recover attorney's fees under a Florida statute. There were no Florida decisions directly in point. The Florida statute provided for an attorney's fee "Upon the rendition of a judgment or decree by any courts of this state against any insurer in favor of any beneficiary under any policy or contract of insurance . . ." The circuit court held that the prevailing insured was entitled to attorney's fee and noted that, "The provision of the Florida statute is a procedural one and the attorney's fees for which it provides are in the nature of a penalty, imposed under the police power of the State, incurred in the conduct of a business affected with a public interest . . ." (258 F.2d at 717).

The appellant in the case at bar has cited *Zumwalt* v. *Utilities Ins. Co.*, 228 S.W.2d 750 for the proposition that attorney's fees should not be allowed. In the *Greyhound* case the Fifth Circuit cited the *Zumwalt* case for another proposition but ignored it on the subject of attorney's fees (258 F.2d 712, 717, 718).

Some four years after *Greyhound*, a Florida State Appeal court squarely faced the question of attorney's fees in the excess judgment case of *American Fire and Casualty Co.* v. *Davis*, 146 So. 2d 615 (1962). There the insurer contended as does State Farm here that an excess judgment case is a tort action and that the statute allowing attorney's fees

did not apply to a tort action. The Florida court denied the insurer's contention, held the statute applicable and upheld the award of attorney's fees.

The *Zumwalt* case relied upon by appellant was a Missouri decision decided in 1950 under the wording of a Missouri statute. The wording of the Missouri statute is much more restrictive than the wording of either the Oregon or Florida statutes. The pertinent parts of the Missouri statute provide: "In any action against any insurance company to recover the amount *of any loss* under a policy . . . if it appear from the evidence that such company has vexatiously refused to pay *such loss*, the court or jury may . . . allow the plaintiff damages not to exceed ten per cent of the amount of the loss and a reasonable attorney's fee; . . ." (emphasis added). The Missouri Court held that the excess judgment action was a tort action and "is not an action to recover "any loss under a policy of insurance." The Court also held that no action on a contract will lie in an excess judgment situation. While the *Zumwalt* case is easily distinguishable, its reasoning is not sound and does not appear to have impressed courts in other jurisdictions on attorney's fees or theories of action.

AMOUNT OF ATTORNEY'S FEE

Counsel for the appellee undertook this excess judgment case under a contingent fee arrangement. The Oregon State Bar previously had promulgated

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AMOUNT OF ATTORNEY'S FEE

Counsel for the appellee undertook this excess judgment case under a contingent fee arrangement. The Oregon State Bar previously had promulgated

a Minimum Bar Fee Schedule, binding on all Oregon lawyers, and which provided for a minimum fee of 40% of the client's recovery, upon trial, under such a contingent fee arrangement (Tr. 40, 41).

At the conclusion of the case, the Federal trial judge, who was a visiting Judge from Nevada, repudiated the contingent fee arrangement although his attention was called to the fact, orally and in a written trial memo, that the Oregon Supreme Court had already approved of a contingent fee in an action against the insurer and where attorney's fees were sought under ORS 736.325 (Tr. 317, 318, 319; R. 68). See *Denley* v. *Oregon Auto Ins. Co.*, 47 P.2d 946 (1935).

Contingent fee contracts are widely used by ethical, reputable lawyers in Oregon.

In an excess judgment case such an arrangement is especially important for a number of reasons.

In the first place, it is obvious that the Legislature in enacting the attorney's fee statute in insurance disputes did so to police the insurance industry and to encourage plaintiffs who felt aggrieved to be able to procure competent counsel to go into battle for them. This legislative aim will be emasculated if Courts only allow meager fees as litigation with insurers is usually difficult and protracted and not always successful. Fair compensation for the plaintiff's counsel has to take into consideration the dry holes as well as those where oil is struck for the client.

In the second place, aggrieved plaintiffs in insurance disputes, especially those with serious personal injuries, are often without funds to pay a competent lawyer on a per diem or hourly basis.

The Oregon State Bar is an integrated Bar and as such is a public corporation. ORS 9.010 provides in pertinent parts as follows:

> "Status of attorney and Oregon State Bar. An attorney, admitted to practice in this state, is an officer of the court; and the Oregon State Bar is a public corporation . . ."

As such public corporation, the Bar enacted minimum fees which Oregon attorneys are required to follow. How then is it right or sensible for a federal court to repudiate the Oregon Supreme Court, the Oregon State Bar and the Oregon Legislature? We believe the Federal trial judge did so without full realization of the consequences.

There is a disputable presumption in Oregon that "Official duty has been regularly performed" (ORS 41.360 (15). The minimum contingent fee prescribed by the State Bar in performing its official duty is 40% of $31,979.38 or $12,791.75. The insurer has not overcome this disputable presumption that such a fee is a regular and reasonable one herein.

Accordingly we ask that the appellee's attorney fee be increased from $4,000.00 to $12,791.75 and that upon affirmance or enlargement of the judgment by this Court that additional attorney's fees be allowed for attorney services on this appeal. See

Michigan Millers Mutual Fire Ins. Co. v. *Grange Oil Co.*, 175 F.2d 544 (9 Cir., 1949); *Horwitz* v. *New York Life Ins. Co.*, 80 F.2d 295 (9 Cir., 1935).

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

JAMES J. KENNEDY
Attorney.